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IN THE SUPREME COURT OF THE UNITED STATES

October term, 1979

No. 79-626

NEWTON H. ANCARROW and
JOSEPHINE ANCARROW,

Petitioners,

vs.

CITY OF RICHMOND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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vs.

CITY OF RICHMOND,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on June 5, 1979.

OPINION BELOW

The opinion of the Court of Appeals below (Appendix A, infra, p.17) is reported at 600 F2d 443, and at 9 ELR 20421. The opinion of the District Court below (Appendix D, infra, p. 36) is not reported.

JURISDICTION

The judgment of the Court below (Appendix , infra, p. 30) was entered on June 5, 1979. Rehearing was denied on July 16, 1979. The jurisdiction of this Court is invoked under 28 USC §1254(1).

QUESTIONS PRESENTED FOR REVIEW

Whether the repeated discharge by a municipality of large volumes of untreated sewage to a navigable river constitutes a taking of property within the meaning of the Due Process Clause of the Fourteenth Amendment to the Constitution where an adjacent riparian owner has suffered direct and substantial injury?

Whether the repeated discharge by a municipality of large volumes of untreated sewage to a navigable river constitutes actionable nuisance as a matter of federal common law for which an adjacent riparian owner who has suffered direct and substantial injury may recover damages?

FEDERAL LAW INVOLVED

Involved in this case are two provisions of the Constitution of the United States: the Eminent Domain Clause of the Fifth Amendment which provides

> nor shall private property be taken for public use, without just compensation

and the Due Process Clause of the Fourteenth Amendment which provides

> nor shall any State deprive any person of life, liberty, or property, without due process of law....

Also involved in this case is the federal common law of nuisance as most recently interpreted by this Court in Illinois v. City of Milwaukee, 406 US 91 (1972).

STATEMENT OF THE CASE

Proceedings Below

On March 30, 1977 the Petitioners, Newton H. Ancarrow and Josephine Ancarrow (hereinafter referred to as "the Ancarrows"), filed a Complaint in the United States District Court for the Eastern District of Virginia, Richmond Division, seeking damages from the City of Richmond and certain individual defendants for injuries to their property alleged to have caused by the sewage disposal system of the City. The claims against the individual defendants were made under 42 USC §1983, based on allegations that these individuals had deprived the Ancarrows of their constitutional rights by allowing the pollution to become so intolerable in the James River that the value of the Ancarrows' property was substantially reduced and also by wrongfully instituting condemnation proceedings to remove the Ancarrows as riparian owners. After conducting discovery regarding the §1983 claims, the Ancarrows concluded that no evidence existed of specific wrongdoing on the part of the individual defendants. The Ancarrows therefore promptly moved to dismiss all claims against these defendants. After denying a motion of certain individual defendants to recover attorneys' fees from the Ancarrows, the District Court granted the request to dismiss this aspect of the action.

The Ancarrows' claims against the City of Richmond are based upon allegations

that the sewage disposal system of the City causes severe pollution of the James River which so interfered with the ability of the Ancarrows to utilize their property that it constituted a "taking within the meaning of the Fifth and Fourteenth Amendments to the United States Constitution.1/ After the District Court, pursuant to the Ancarrows' request, dismissed all claims against the individual defendants, only the action against the City remained.

On October 25, 1977, the City filed a Motion to Dismiss for Lack for Jurisdiction and a Motion for Judgment on the Pleadings, claiming, in essence, that the Ancarrows had not stated a cause of action against the City and that the remaining aspect of the case should also be dismissed. The District Court, on November 18, 1977, denied these motions, indicating that the Ancarrows had stated a cause of action under the United States Constitution and also that the "taking" alleged in this case is different from that involved in the state condemnation proceeding pursuant to which the City took title to the Ancarrows' property in 1976.

Over the objection of the Ancarrows, and after receiving briefs and hearing oral argument, the District Court on December 19, 1977 decided to abstain to enable the Ancarrows to obtain a determination from the state court as to

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1/It is also alleged that federal admiralty jurisdiction exists and that federal common law is applicable. Various "pendent" claims under state law also set forth in the Complaint.

whether they had riparian property rights which could have been the subject of a "taking" within the meaning of the Fifth and Fourteenth Amendments.

On January 18, 1978 the Ancarrows filed a Notice of Appeal in which they sought review of the District Court's abstention Order. On January 30, 1978, the City filed a Motion to Amend the District Court's Order of November 18, 1977, in which it had denied the City's motions. The amendment sought was the inclusion of appropriate language pursuant to 28 USC §1292(b) placing the case in a proper posture for an interlocutory appeal of those rulings. On February 13, 1978 the District Court granted this motion, and on March 13, 1978 this Court granted the petition of the City of Richmond for permission to appeal the interlocutory order.

A panel of the Court of Appeals received briefs and oral argument and, on June 5, 1979, reversed the District Court's order and remanded the case for dismissal of the complaint. The opinion of the Court of Appeals predicated that decision on two grounds. First, the Ancarrows could not rely on federal common law of nuisance or admiralty jurisdiction. Second, there was no taking of their riparian property rights because under Virginia law, such rights are always subordinated to the right of a municipality to pollute those waters for sewage disposal.

Factual Background

As alleged in the Complaint, in 1961 and 1962 the Ancarrows purchased a total of approximately fourteen acres of land on the James River in the vicinity of the present location of the Richmond sewage treatment plan. At the time of their purchase of the subject property, the Ancarrows intended to operate on the property a boat building and repair facility and a marina. Based in part upon representations of officials of the City of Richmond that pollution problems in the James River caused by the City's sewage disposal system would be remedied, the Ancarrows spent several hundred thousand dollars to construct a boat ramp and travel lift slip2/ on the property, as well as other facilities.

It is further alleged in the Complaint that the City did not alleviate the severe pollution in the James River caused by the operation of its sewage disposal system and that as a result of the pollution the Ancarrows were unable to operate the facilities on the subject property in an economically feasible fashion. It was further alleged that the value of the Ancarrows' property was thereby significantly reduced.

On April 5, 1976 officials of the City condemned the subject property and the Ancarrows were awarded compensation for the value of their property at the time of

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2/The purpose of the travel lift slip was to facilitate the removal of boats from the water.

the condemnation proceeding. This value was found by the Commissioners in the condemnation proceeding to be $130,000. Very little value was attributed to the boat ramp and travel lift slip by appraisers who testified in that proceeding; the reason was that there was virtually no use for those facilities. The Ancarrows intend to demonstrate at the trial of this action that the lack of use resulted from the polluted condition of the James River.

The Ancarrows further allege that because the value of their property had been significantly reduced by the pollution caused by the City, the award received in the state condemnation proceeding was substantially less than it would have been had the James River not been severely polluted. In this action the Ancarrows seek damages primarily for the difference in the value of their property on April 6, 1976, as determined in the state condemnation proceeding, and the value of their property would have had but for the continuing activity of the City in polluting the James River.

It is alleged by the Ancarrows that the interference with their property by the pollution caused by the City was so substantial as to constitute a "taking" which pre-existed the state condemnation proceeding and which, as indicated, resulted in the condemnation award being substantially less than it otherwise would have been had the pollution not existed. A trial by jury was demanded.

REASONS FOR GRANTING THE WRIT

1. The decision below is in conflict with applicable Virginia law which prohibits the unreasonable use of sewers where a nuisance results or where a riparian owner's land, in addition to his right to use adjacent waters, is substantially damaged.

The Court of Appeals misapplied Virginia law in concluding that

> a citizen's riparian right to use public waters of a particular purity is always subject to the superior right of the public to pollute those waters for sewage disposal.

600 F2d at 446, 9 ELR 20423. The only citation of authority for that proposition was the Fourth Circuit's own 1936 decision in DuPont Rayon Co. v. Richmond Industries, 85 F2d 981.

In Virginia as in other jurisdictions,3/ a riparian right is a valuable property right. Thurston v. City of Portsmouth, 205 Va. 909, 912, 140 SE2d 678, 680 (1965); Hite v. Town of Luray, 175 Va. 218, 226, 8 SE2d 369, 371 (1940); Peek v. City of Hampton, 115 Va. 855, 859, 80 SE 593,

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3/See generally Wm. B. Stoebuck, Nontrespassory Takings in Eminent Domain ch. 3 (Charlottesville, Va.: Michie Company, 1977).

594 (1914); Taylor v. Commonwealth, 102 Va. 759, 771, 47 SE 875, 880 (1904). It has been held to be subject to a taking by eminent domain. Peek v. City of Hampton, supra. See also Town of Purcellville v. Potts, 179 Va. 514, 522-23, 19 SE2d 700, 703 (1942)(dictum).

Riparian rights may be severed from the land under Virginia law and dealt with separate and apart from the realty to which they were once appurtenant. Thurston v. City of Portsmouth, supra; Waverly Water-Front & Improvement Co. v. White, 97 Va. 176, 33 SE 534 (1899).

The Virginia law of riparian rights is broader than the common law in that a Virginia riparian owner holds title to the ordinary low water mark rather than to the ordinary high water mark as at common law. Thurston v. City of Portsmouth, supra; French v. Bankhead, 52 Va.(11 Gratt.) 136 (1854).

In DuPont Rayon, supra, the court recognized that there are limits to the public's right to discharge sewage to navigable waters.

> It is for the state to say ... how much pollution it will permit to be emptied into and upon its waters, so long as the owners of the land between low-water and high-water mark are not injured.

85 F2d at 983 (Emphasis added). It also specifically noted that "the question in-

volved relates merely to the right of the riparian owner to use the water and prevent pollution thereof, not to the fouling of land of which he is owner." Id.

The DuPont Rayon case was initiated by a downstream industrial user of water from the James River for process water. It sought to enjoin a manufacturer from discharging dye into the sewers of the City of Richmond. The facts of that case were clearly different from the situation experienced by the Ancarrows. The DuPont Rayon opinion, by its own terms, left open the question whether "unreasonable" use of the sewers would constitute a private nuisance.

Virginia courts have consistently limited the "superior right" of municipalities to discharge sewage to streams and otherwise to degrade the environment. Such privilege does not extend to creating a nuisance. City of Newport News v. Hertzler, 216 Va. 587, 221 SE2d 146 (1976) (dictum); Commonwealth v. City of Newport News, 158 Va. 521, 164 SE 689 (1932); Ashbury v. City of Norfolk, 152 Va. 278, 147 SE 223 (1929).

The Ancarrows alleged that the discharges of raw sewage by the City created a situation in which the James River in the immediate vicinity of their property was so fouled with fecal matter, dead rats, used condoms and other debris that the use of the river, particularly for recreational purposes, was virtually eliminated. In addition, they alleged that these discharges from the City's sewers floated onto their land, even above the ordinary

high water mark, and caused a substantial interference with the use of their land.

The manner in which the City's sewage discharge affected the Ancarrows makes their injury different not only in degree, but also in kind from that suffered by the general public. Their ownership of a specific property right in the area above the low water mark which was physically invaded by the pollutants and debris emanating from the City's nearby outfalls establishes the requisite property interest for purposes of determining whether a taking has occurred for which compensation must be paid. See, e.g., Thornburg v. Port of Portland, 233 Ore. 178, 376 P2d 100 (1962); City of Walla Walla v. Conkey, 6 Wash. App. 6, 492 P2d 589, 2 ELR 20172 (1971).

Alternatively under Virginia law, the argument could be advanced that the creation of a nuisance by a municipality constitutes only a tort and does not amount to a taking. The exception to the rule that a municipality may pollute a stream could be viewed as a determination by the courts that the municipality will not be immune from tort liability in such instances.

The outcome under either approach, however, would be the same. The recovery by a riparian owner for such a nuisance on a condemnation theory would be identical to recovery on a tort theory. See Wm. B. Stoebuck, supra note 3, at pp. 82-85. (The practical importance of the difference, of course, is obvious in jurisdictions which do not make an exception as in Virginia to a municipality's immunity from

tort liability for nuisances.)

The Ancarrows have stated a basis for recovery under Virginia law and the Fourteenth Amendment to the Constitution of the United States. The decision below was predicated upon a misreading of the applicable Virginia law.

2. The decision below conflicts with applicable decisions of this Court as to the federal law governing the taking of property for purposes of the Due Process Clause of the Fifth Amendment as applied to the States through the Fourteenth Amendment and as to the federal law governing the creation of nuisances in navigable waters.

Insofar as the Due Process Clause is concerned, the doctrine of sovereign or governmental immunity cannot be used by a municipality to defeat the claim that property has been taken without just compensation. See Darling v. City of Newport News, 249 US 540 (1919), aff'g 123 Va. 14, 96 SE 307 (1918). See also Pennsylvania Coal Company v. Mahon, 260 US 393 (1922); Baltimore & P. RR v. Fifth Baptist Church, 108 US 317 (1883); Pumpelly v. Green Bay Company, 80 US (13 Wall.) 166 (1871).

In Darling this Court observed that a municipality's right to discharge wastes into navigable waters under Virginia law ceases when "it should create a nuisance that so seriously interfered with private property as to infringe constitutional rights." 249 US at 543.

To the extent that Virginia law purports to permit a municipality to substantially interfere with the use and enjoyment of private property in the process of disposing of its wastes such a state rule offends the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution of the United States. See Portsmouth Harbor Land & Hotel Company v. United States, 260 US 327 (1922)(firing guns over a resort held to be a taking); United States v. Causby, 328 US 256 (1946)(overflights below "minimum safe altitude" and, hence, within the airspace of farm and residence held to be a taking).

In Richards v. Washington Terminal Company, 233 US 546 (1914), the Court held that damages to private property resulting from smoke, gases, dust and cinders (but not from vibrations) due to the presence of a tunnel handling train traffic constituted a private nuisance which amounted in effect to a taking of private property for public use. That case is still good law.

The significance of this case is that it presents for review a fact situation allowing the Court to clarify the law relating to inverse condemnation by nuisance and to distinguish it from the law of tortious nuisance which may be actionable under federal common law by extention of the doctrine of Illinois v. City of Milwaukee, 406 US 91 (1972).

Illinois v. City of Milwaukee involved an effort to enjoin a public nuisance in the form of discharges by a city of untreated sewage to interstate waters. In subsequent cases, the circuit courts

have been asked to determine whether federal common law extends to navigable, but not interstate waters. Committee for Consideration of Jones Falls Sewage System v. Train, 539 F2d 1006 (4 Cir. 1976); Stream Pollution Control Board v. United States Steel, 512 F2d 1036 (7 Cir. 1975).

This case also provides an opportunity for the Court to clarify the law relating to the degree to which states may immunize governmental activities from the requirements of the Eminent Domain Clause by declaring that the interest interfered with is not a "property" right. Further, the Court in this case can determine whether a state and its political subdivisions may pollute navigable waters as a legitimate exercise of the police power when such pollution amounts to a public or private nuisance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that 3 true copies of the foregoing Petition for a Writ of Certiorari, were mailed, first class postage prepaid, this 15th day of October, 1979 to C. Tabor Cronk and Albert J. FitzPatrick, Assistant City Attorneys, City Hall, Room 300, Richmond, Virginia 23219, Counsel to City of Richmond.

APPENDIX A

Text of opinion below in Ancarrow v. City of Richmond, 600 F2d 443, 9 ELR 20421 (4 Cir. 1979)

Newton H. ANCARROW and Josephine Ancarrow, Appellants,
v.
CITY OF RICHMOND, Appellee.
Newton H. ANCARROW and Josephine Ancarrow, Appellees,
v.
CITY OF RICHMOND, Appellant.
Nos. 78-1178, 78-1191
United States Court of Appeals, Fourth Circuit.
Argued, Jan. 8, 1979.
Decided June 5, 1979.

K. K. Hall, Circuit Judge:

Plaintiffs Newton H. and Josephine Ancarrow filed suit in district court against the City of Richmond, and various city officials, alleging that the city's continuing pollution of the James River had rendered their property, developed as a marina, valueless for this particular use -- a "taking" in the constitutional sense. Federal jurisdiction was invoked under admiralty law, federal common law, 42 U.S.C. § 1983 and the fourteenth amendment. The district court held that a valid claim was stated under the fourteenth amendment, but abstained to allow the Virginia courts to determine the nature and extent of plaintiff's riparian rights in the public waters of the James River. Because we think that no federal question is presented in this case, we reverse and remand for dismissal of the complaint.

I.

In 1961 and 1962 the plaintiffs purchased land along the James River, near the City of Richmond sewage

treatment plant. For several years they made costly improvements to the property, attempting to develop it into a marina. However, the river's polluted condition made it unattractive to the public for recreational purposes, frustrating the Ancarrow's attempts to enhance their property's value as a marina.

It is conceded that the level of pollution today is no greater than at the time the plaintiffs purchased their property.[1] Further, the plaintiffs do not contend that the pollution is in any way violative of applicable state or federal law.

In 1975, the city condemned the property for expansion and improvement of the adjacent sewage treatment plant. In state court proceedings, the fair market value of the property for all existing and prospective uses was established; little value was attributed to the existing and prospective marina use. The Ancarrows did not appeal the state court's valuation of the property. Instead, they brought this action in federal court seeking damages for the unrealized value of their marina improvements, alleging that the City of Richmond had "taken" their property

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1/The Ancarrows allege that, before they made their marina improvements, city officials represented to them that the city's dumping of sewage into the James River would abate and, absent that representation, no improvements would have been made.

prior to the condemnation by continuing to pollute the river.

The defendants contended that the claim was res judicata because it could have been litigated in the state condemnation proceedings. The district court rejected this defense and held that a cause of action under the fourteenth amendment would lie if some property interest had been taken by the city's continuing pollution of the river. However, the court abstained from hearing the case until the parties sought a determination in the Virginia courts of the nature and extent of plaintiffs' property interest in the water quality of the river. We think abstention was unnecessary because, on the facts alleged by the plaintiffs, no federally protected right has been violated.

II.

As noted previously, the plaintiffs alleged four separate bases for federal court jurisdiction. In addition, they asked the district court to entertain four state causes of action in its exercise of pendent jurisdiction: nuisance, negligence, trespass and a taking of or damage to property without compensation in violation of Virginia's constitution.

(1) It is well established in this circuit that a claim for damages arising from a public body's unlawful pollution of state waters is not within either federal common law or admiralty jurisdiction. No federal common law action will lie "where the controversy is strictly local, where there is no claim of vindication of the rights of

another state and where there is no allegation of any interstate "effect" attending the pollution. Committee for Consideration of Jones Falls Sewage System v. Train, 539 F.2d 1006, 1010 (4th Cir. 1976). Likewise, we cannot review this claim under admiralty jurisdiction because the alleged harm to the Ancarrows' property has not resulted from a traditional maritime activity. Moore v. Hampton Roads Sanitation District Commission, 557 F.2d 1037, 1038-39 (4th Cir. 1977) (en banc), rev'g 557 F.2d 1030 (4th Cir. 1976); cert. denied, 434 U.S. 1012, 98 S.Ct. 725, 54 L.Ed.2d 755 (1978).

We think the plaintiffs' cause of action sounds in traditional property law and can only be reviewed in federal court as a unconstitutional taking of property -- either a taking of plaintiffs' riparian rights or an interference with their related land-based property rights to develop a successful marina adjacent to the river.[2/] Since we agree with the district court that res judicata is not a bar to federal review

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[2/] An action under 42 U.S.C. § 1983 lies only for denial of a federally protected right. Any equitable contract law claim for detrimental reliance on alleged misrepresentations of city officials would pose questions of state law only. See n. 1 supra. Perceiving no constitutional rights involved here other than the essential constitutional right to be free from an uncompensated taking of property, we consider the § 1983 claim to rise and fall with that right. See Monell v. Dept. of Soc. Serv. of City of N.Y., 436 U.S. 658, 98 S.Ct. 2018, 2051 n.4, 56 L.Ed.2d 611 (1978).

of the plaintiffs' claims, we must reach the constitutional issue.

III.

(2) Condemnation proceedings are by their nature res judicata for any claims involving valuation of the property, existing and future, at the time of the condemnation. But they are not res judicata for an alleged devaluation of the property which occurs before and is independent of the actual condemnation. A condemning body's prior negligent or intentional interference with valuable property rights cannot be disregarded by federal or state courts merely because it can legally take record title and possession of property for a public use. See Foster v. City of Detroit, Michigan, 405 F.2d 138, 141 (6th Cir. 1968).

For the de jure condemnation and the de facto taking, plaintiffs' claims for compensation rest upon two unrelated acts of the condemning body. Distinct issues of law and fact are presented. Different property rights are involved and those property rights must be valued separately -- once for the taking of title, with valuation set at or before the time of the condemnation, and once for the prior taking, with damages awarded for devaluation before condemnation. The de facto taking claim was not adjudicated in the condemnation proceedings, nor does it appear that it could have been under Virginia law. See Kornegay v. City of Richmond, 185 Va. 1013, 1030, 41 S.E.2d 45, 53 (1947). See also Fugate v. Martin, 208 Va. 529,

159 S.E.2d 669 (1968).[3]

Therefore, we turn to plaintiffs' claim that their property has been taken without compensation under the fourteenth amendment.

IV.

(3) The gravaman of plaintiffs' due process claim is that they have a riparian right to use public waters in a navigable stream, which was taken in the constitutional sense by the city's continuing pollution of the James River. Had the river been unpolluted at the time plaintiffs' property was condemned, the value of their marina would have been enhanced and their condemnation recovery correspondingly greater. Accepting these factual allegations as true, in the posture of motion to dismiss, we think the claim meritless.

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[3] Although the issue could not have been raised in the condemnation proceedings proper, it does appear that the issue could have been raised in the state court under the permissive declatory judgment jurisdiction of circuit courts. Va. Code §§ 8.01-184 and 186 (1977 Repl.Vol.). See Stroobants v. Fugate, 209 Va. 275, 163 S.E.2d 192 (1968). But plaintiffs cannot be penalized for failing to avail themselves of this alternative, for this in effect would impose a requirement of exhaustion of state remedies. See Ballard Fish & Oyster Co. v. Glaser Construction Co., 424 F.2d 473, 475 (4th Cir. 1970); Foster v. City of Detroit, Michigan, 405 F.2d at 145.

It is important to note at the outset that plaintiffs do not allege that there was a nuisance-like physical invation of their exclusive land space. See Darling v. City of Newport News, 249 U.S. 540, 543, 39 S.Ct. 371, 63 L.Ed. 759 (1919); Griggs v. County of Allegheny, Pennsylvania, 369 U.S. 84, 82 S.Ct. 531, 7 L.Ed.2d 585 (1962); Nunnally v. United States, 239 F.2d 521 (4th Cir. 1957); Batten v. United States, 306 F.2d 580 (10th Cir. 1962). Nor do they allege that their access to the James River was blocked, impairing their riparian use of it. See United States v. Welch, 217 U.S. 333, 30 S.Ct. 527, 54 L.Ed. 787 (1910). Rather, plaintiffs claim that they have a state-recognized riparian right to damand water of a particular purity, both for their own use and for the use of customers at their marina. They also claim a right which may best be termed a right of beneficial location to have the city put the public water of the James River to a use which is more favorable to their commercial marina development than the present use for sewage disposal.

A.

(4) Under Virginia law, a citizen's riparian right to use public waters of a particular purity is always subject to the superior right of the public to pollute those waters for sewage disposal. DuPont Rayon Co. v. Richmond Industries, 85 F.2d 981 (4th Cir. 1936). As Judge Parker wrote in Dupont:

> "If the waters of the stream become polluted from (public sewage disposal), no right of the riparian

owner is invaded, because his right to use such waters is subject to the superior right of the public; and any damage which he sustains because of the public use is damnum absque injuria. If complainant needs water of a peculiar purity for manufacturing purposes, it should be careful to locate its plant on a stream not subject to such a right of user on the part of the public; for it is clear under the law of Virginia that neither the public health nor the industrial development of its tidewater cities, both of which are dependent upon sewage disposal, can be subordinated to the rights of a riparian owner to make use of public waters for private purposes."

85 F2d. at 984. We think this reasoning applies with equal force to plaintiffs, who claim a superior right to use water of a particular purity for their marina development.

Plaintiffs contend that DuPont is not controlling because there has been an intervening change in Virginia law which limits the public's right to pollute and, by implication, gives them a new riparian right superior to the public's right. We cannot agree. Va. Code § 62.1-44.4 (1973 Repl. Vol.),[4] relied on by plaintiffs, is merely

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[4] §62.1-44.4. Control by State as to water quality. -- (1) No right to continue existing quality degradation in any State water shall exist nor shall such right be or be deemed to have been acquired by virtue of past or future discharge of sewage, industrial wastes or other wastes or other action

one portion of a statutory scheme to regulate the quality of the Commonwealth's waters. The statute does not by its terms purport to grant a new riparian right to private property owners which is superior to a city's state-regulated right to lawfully pollute public waters. Plaintiffs' argument that such a right is implied is untenable in light of the statutory language, and would bring about an absurd result: the creation of a new cause of action for riparian owners which would in effect penalize the city for its full compliance with that regulatory scheme. Nothing in the statute leads us to believe that the General Assembly intended Virginia's

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by any owner. The right and control of the State in and over all State waters is hereby expressly reserved and reaffirmed. (2) Waters whose existing quality is better than the established standards as of the date on which such standards become effective will be maintained at high quality; provided that the Board has the power to authorize any project or development, which would constitute a new or an increased discharge of effluent to high quality water, when it has been affirmatively demonstrated that a change is justifiable to provide necessary economic or social development; and provided, further, that the necessary degree of waste treatment to maintain high water quality will be required where physically and economically feasible. Present and anticipated use of such waters will be preserved and protected.

cities to be caught in such a legal revolving door. Therefore, any claim that the Ancarrows' riparian rights were "taken" by the city's continuing lawful pollution was laid to rest by our decision in DuPont.

B.

Plaintiffs also contend that they have come right of beneficial location: in essence, that the city cannot constitutionally use the James River in a way which diminishes the value of land along that river. More particularly, plaintiffs claim that the city has, by its pollution of the river, "taken" the inherent commercial value which attaches to their property by virtue of its location near public waters. This contention fails because no such property right exists.

(5) Although the fourteenth amendment protects a property owner from government's direct interference with the use of his property when that interference substantially eliminates the value of his title to it, United States v. General Motors Corp., 323 U.S. 373, 378, 65 S.Ct. 357, 89 L.Ed. 311 (1945); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922); Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U.S. 317, 2 S.Ct. 719, 27 L.Ed. 739 (1883); it does not protect the owner from fluctuations in the value of his property resulting from governmental decisions to put neighboring public property to a lawful, albeit unattractive, use. Reichelderfer v. Quinn, 287 U.S. 315,

53 S.Ct. 177, 77 L.Ed. 331 (1932). And, even assuming that plaintiffs have suffered substantial loss in the value of their marina improvements due to the city's continuing lawful pollution, no action under the fourteenth amendment will lie unless some distinct property right, personal to plaintiffs, has been taken. Here, plaintiffs have suffered a consequential injury which, "though greater in degree than that of the rest of the public, is the same in kind." Id at 320, 53 S.Ct. at 179.

The unattractive use to which the city has put the James River may have a very detrimental effect on the value of property along the river's shore.

> "But the existence of value alone does not generate interests protected by the Constitution against diminution by the government, however unreasonable its action may be. The beneficial use and hence the value of abutting property is decreased when a public street or canal is closed or obstructed by public authority, or a street grade is raised, or the location of a county seat, or of a railroad is changed. But in such cases no private right is infringed."

Id at 319, 53 S.Ct. at 178-179 (citations omitted). We think this language dispositive of plaintiffs' claim that some right of beneficial location was taken in the constitutional sense by the city's decision to continue its lawful pollution of public waters. If the city, by exercising its statutory authority to pollute, were held accountable to riparian owners for indirect, consequential diminution of property value, the admonition of Justice Stone would

be apt: "the powers of government would be exhausted by their exercise." Id. See Nunnally v. United States, 239 F.2d at 524.

Conclusion

(6) Having concluded that plaintiffs have no riparian right or other property right which was "taken" by the city's pollution of the James River, we perceive no other ground on which a fourteenth amendment claim could rest. Accordingly, we find that the district court erred in denying the city's motion to dismiss the complaint for failure to state a federal claim upon which relief may be granted.[5/] The judgment of the district court is reversed, and the case remanded for dismissal of the complaint.

REVERSED.

5/ Since the federal claims are without merit and should be dismissed before trial on the merits, it follows that the district court is without jurisdiction to entertain the pendant state claims. Sigmon v. Poe, 564 F.2d 1093, 1096 (4th Cir. 1977).

APPENDIX B

Judgments and orders
of the Court of Appeals

JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE
FOURTH CIRCUIT
No. 78-1178

Newton H. Ancarrow and
Josephine Ancarrow,
Appellants,

vs.

City of Richmond,
Appellee.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed.

Filed Jun. 5, 1979 William K. Slate,II
Clerk

JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE
FOURTH CIRCUIT
No. 78-1191

Newton H. Ancarrow and
Josephine Ancarrow,

Appellees,

vs.

City of Richmond,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed.

Filed Jun. 5, 1979 William K. Slate,II
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1178

Newton H. Ancarrow and
Josephine Ancarrow,

Appellants,

versus

City of Richmond,

Appellee.

Newton H. Ancarrow and
Josephine Ancarrow,

Appellees,

versus

City of Richmond,

Appellant.

No. 78-1191

Appeals form the United States District Court for the Eastern District of Virginia, at Richmond. D. Dortch Warriner, District Judge.

Upon consideration of the petitions for rehearing by counsel,

IT IS ORDERED that the petitions for rehearing are denied.

Entered at the direction of Judge Hall for a panel of Judge Widener, Judge Hall and Judge Phillips.

Filed Jul. 16, 1979

For the Court
By direction

William K. Slate,II
Clerk

APPENDIX C
ORDERS OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

NEWTON H. ANCARROW, et al : CIVIL ACTION
v. : NO. 77-0183-R
CITY OF RICHMOND, et al :

ORDER

For the reasons stated from the bench this Court will ABSTAIN but retain jurisdiction while the plaintiffs apply to the State courts for a declaration of State law.

It is ORDERED that the State law question which this Court abstains from answering is:

> What was the nature and character under Virginia law of plaintiffs' rights, as abutting landowners, to the use and enjoyment of their property without pollution of the James River by sewage from the City of Richmond?

This action is STAYED until the filing herein of a motion from any party to reopen for appropriate cause.

And it is so ORDERED.

Let the Clerk send a copy of this order to all counsel of record.

D. Dortch Warriner
United States District Judge
19 Dec. 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

NEWTON H. ANCARROW, et al : CIVIL ACTION
v. : NO. 77-0183-R
City of Richmond :

ORDER

This matter is before the Court on the defendant's motion of 30 January 1978 for the Court to amend its order of 18 November 1977 denying the defendant's motion to dismiss. Defendant moves the Court to certify that "such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

Upon consideration whereof, it is ADJUDGED and ORDERED that defendant's motion of 30 January 1978 be, and the same is hereby GRANTED. Accordingly, the order of 18 November 1977 denying defendant's motion to dismiss is hereby AMENDED to include the following:

> Furthermore, it is ADJUDGED and ORDERED that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal from this order may materially advance the ultimate termination of the litigation.

Let the Clerk send a copy of this order to all counsel of record.

D. Dortch Warriner
United States District
Judge

Date: 13 February 1978

APPENDIX D
ORAL OPINION OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

NEWTON H. ANCARROW and JOSEPHINE ANCARROW, Plaintiffs,	:
vs.	:DOCKET NUMBER:
CITY OF RICHMOND, Defendant.	:77-0183

Transcript of the Court's Opinion in the above when heard on the 30th day of November and 1st day of December, 1977, before The Honorable D. Dortch Warriner, Judge.

THE COURT: Gentlemen, I have written out several pages on my yellow pad and I will read to you what I have written . When the Court Reporter has typed this up, I reserve the right to expand on it and put the correct citations, also to correct any grammatical errors, and so forth.

If the quwstion were merely one of the invasion of a well defined property right by a City-created nuisance as contended for by Mr. Annand, then I think abstention would be ill-advised. But, as the Court conceives it, the property right is not only ill-defined -- it may not exist at all. If it exists the definition of the right is obscure.

Common law rights in rivers and streams, whatever they were, have been drastically and dramatically altered by recent water control and anti-pollution legislation.

The present state of the law, Mr. Annand, is anybody's guess.

Parenthetically, in twenty years at the Bar, I have never known of a similar question and I have certainly never known what the answer to that question is. I say that parenthetically because I think my own ignorance is certainly no basis upon which this court should abstain only to have a State Court Judge have to work it over.

I say that merely to comment upon the vact that the State law in this area -- if it is well defined, clear, and settled -- never came to my attention as a general practitioner of the law.

The rights that one has in property are essentially defined and delineated by State law. I would almost say "established by State law", but I believe that the concept of a man's right to own property is generally associated with a natural law and that, perhaps, even the State could not deprive us of that right. I certainly hope that is the law because as long as people can own property they can't be slaves.

This whole case rides or falls on the State law question: If there be no property right, there is no right for the Ancarrows to recover anything. Depending upon what that property is, what its reach is, and what its dimensions are, just so much and no more, they are entitled to compensation.

The determination of what its value is -- once the right has been defined -- is of little moment, so far as the law is concerned. It is not complicated.

You tell me what property "A" is worth and tell me that is has been taken and I can very quickly tell you that you are entitled to the same number of

dollars that you said it was worth.

That is not the real question in this case. The real question in this case is unsettled State law. What is that property right? What are its dimensions? How is it held?

No matter what this Court might decide about what that property right is, this Court's decision is of little moment and no legal force and effect in the determination of what landowners in Virginia have in the way of property rights.

A substitute judge in the General District Court of the Commonwealth is free legally to disregard anything this Court may say in determining what rights Virginia citizens -- or Virginia landowners -- have in property.

The state of the law at the end of this Court's question would be almost precisely the state of the law at the beginning of this Court's question. This Court will have simply made a guess as to what the State law is.

There is another factor that I think, perhaps, has equal importance; that is, that the regulations of rivers and streams is a function of the Commonwealth. It is no less a function of the Commonwealth than the building and maintenance of State highways. Just as highways belong to the Commonwealth, so, also, does the tidal James belong to the Commonwealth. It belongs to the Commonwealth in a proprietary sense as well as a sovereign sense.

Indeed, the ownership of the James by the Commonwealth, both the water and bottom, is of more ancient ownership than the highways. After all, the ownership of highways comes by exer-

cise of the right of eminent domain. The State can own only that which the condemnee owned.

The rights that the Commonwealth has in the James River is the right won by conquest and from the very nature of sovereignty itself.

I suppose that Virginia has owned the James since 1607 when the settlers sailed up the water to Jamestown. In any event, the Commonwealth has owned the James since it declared its independence from Great Britain.

The property rights that one may have in these State-owned waters -- the tidal James -- the right that landowners might have to clean State rivers, are property rights that may be granted, denied, modified, increased, and perhaps abrogated.

In recent years the General Assembly has been most active in this field of granting, denying, modifying, increasing, and so forth these rights.

The waterway system is -- and it should be -- the subject of pervasive State concern and State regulation, under the State Water Control and Pollution Act by the State Water Control Board.

This Court should not venture into this complicated field of State control by finding property rights coupled with an admittedly novel right of action which could alter the entire approach which the State has sought to implement through its application of the common law of Virginia modified by recent legislation.

Further, insofar as the supposed superior competency of the Federal Courts is concerned, that competency would

exist only if we were dealing with matters of Federal application.

This Court readily admits and acknowledges that the State courts have greater competency in matters that have State application, but this decision has no Federal application.

Rights of landowners in Virginia are defined, granted, modified, or delineated by Virginia lawmakers. Those laws have no force and effect outside of the Commonwealth and I would suppose that a landowner involved with water rights abutting streams in New Mexico would be appalled at what the lawmakers of Virginia deem to be and have ordained as rights in Virginia.

The application of any decision, in this case, would have no Federal application. It would have effect only with respect to Virginia landowners.

The beer distributor case, AFB Beer Distributors against Pearl Brewing Company, I believe, as decided by the Fourth Circuit in 1973, and Martin against Creasy, decided by the Supreme Court in 1959, are distinguishable from the present case on several points. But, the impact of those cases upon the decision that this Court has to make is overwhelming and I think that it is clear that this Court must abstain.

Now, both the AFB case and Martin against Creasy teach that the Court should not only abstain, but that the action should be dismissed. In both of those cases, as here, the essential question was the existence of rights under State law. Also, as here, the State courts were fully competent, procedurally, to decide the question.

Of course, there is no question, in

this Court's mind, as to their competency in matters of substance and the Court is strongly persuaded that dismissal is the proper course to take.

But, I am referred to Thibodaux -- which was decided the same day as Martin against Creasy -- which indicated that under circumstances somewhat similar to what we have here that a stay might be more appropriate.

Frankly, with the assurance that this Court has received from Mr. Cronk that upon a determination by a State court that under State law Mr. Ancarrow had property rights that the City of Richmond would immediately institute condemnation proceedings, under those circumstances, there is no real reason for a stay here.

The property rights that plaintiff may be found to have under State law would be evaluated then in a State condemnation proceeding which is a special proceeding involving a special type of jury, commissioners, and involving a special type of verdict with special rights to take exception to that verdict and so forth.

Every other property right owner in the Commonwealth of Virginia who has his property taken is entitled to adjudication as to the value of the property only under such a proceeding.

There may be a serious question as to whether Mr. and Mrs. Ancarrow are entitled to an evaluation under some different proceeding involving persons who are not landowners, which would involve a different number of jurors and involving a different type of verdict.

It may be that all that they would be entitled to in this Court is

damages for the denial or regusal on the part of the City to condemn and they would be entitled only to a State Court proceeding for condemnation.

What I am saying is that when the property right has been ascertained by a State Court -- if it is ascertained -- perhaps the relief to which the plaintiffs would be entitled here is an order directly to the City of Richmond to condemn, assuming they had not already done so.

Perhaps what they would be entitled to here would be a Federalized-State Court condemnation proceeding. A proceeding which followed the right tract; a State Court proceeding; so that the rights Mr. Ancarrow has would be a right which he enjoys in common with all other Virginia landowners -- that is the right not to lose their land, except through eminent domain proceedings.

I suppose the thing to do -- if you pardon the expression -- is cross that bridge when we reach it.

I am not making ajudgment now as to what relief the plaintiffs would be entitled to when they are returned to this Court after a determination in the State Court that indeed they do have property rights and that the property rights are and consist of this, this, that, and the other.

The Court has given consideration as to the equitable nature of what it does today. I feel reasonably sure that a reasonable man could say that abstention, in this case, is unfair to the Ancarrows, but I don't think that it can properly be said that it is inequitable.

Justice is obtained, we believe, by obedience to the law.

Justice is not obtained by applying individual concepts of fairness.

It is true that if you have a fair judge, and he applies his concept of fairness, they you will have a fair tyrant, but he is a tyrant nevertheless.

I don't believe that we want to resort to that type of "decision."

Justice is obtained by obedience to the law.

I think this case mandates abstention.

I am not certain whether the law also mandates dismissal. Since I am not certain on that point, I will, out of an abundance of caution, enter only a stay so that what questions may arise down the road as to the plaintiffs' rights will be questions which, if the plaintiffs choose -- will be decided in a Federal forum.

The question which must be answered, is the Court formulates it -- and I am going to invite your comments -- is as follows: Did the plaintiffs at any time own property rights under Virginia law, as abutting landowners to the James River, in a river sufficiently free of City-caused pollution to make the operation of a marina a commercially feasible venture? If so, was this property right taken from them under Virginia law?

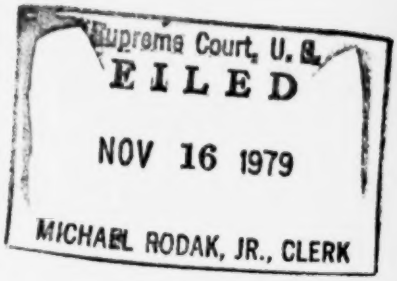
I recognize that there can be a separate issue of a "taking" under the Federal Constitution, but it is important for the Court to know whether there has been a "taking" under Virginia law without just compensation.

If so, plaintiffs are entitled to a remedy. Even if there has not been a "taking" under Virginia law, but a

"taking" under the Federal Constitutional principles the plaintiffs may also be entitled to a remedy -- perhaps a separate or different remedy.

IN THE SUPREME COURT OF THE UNITED STATES

October term, 1979



No. 79-626

NEWTON H. ANCARROW and
JOSEPHINE ANCARROW,

Petitioners,

v.

CITY OF RICHMOND,

Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

October term, 1979

No. 79-626

NEWTON H. ANCARROW and
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CITY OF RICHMOND,
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BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

STATEMENT OF THE CASE

Preliminary Statement

This action was filed in the United States District Court for the Eastern District of Virginia at Richmond on March 30, 1977. The Ancarrows asserted claims against various members and former members of the Council of the City of Richmond, the City Manager, several of its department directors and, the City itself. The Complaint contains a 42 U.S.C. §1983 claim, a claim of a taking without just compensation, an admiralty claim, a claim based on federal common law and various pendent claims. By order reflecting agreement of counsel, the District Court dismissed with prejudice the 42 U.S.C. §1983 claim against all but the individual defendants in that capacity and dismissed the remaining claims against all but the City in its corporate capacity. Subsequently, the 42 U.S.C. §1983 claim was dismissed with prejudice as against all of the individual defendants.[1]

---

[1]Pursuant to Rule 21 of the Rules of this Court, the City has requested the Clerk of the U.S. District Court for the Eastern District of Virginia, at Richmond, to certify and transmit to this Court the Complaint, the Orders of the District Court dismissing the Complaint against various parties defendant as well as a memorandum opinion relevant to several of those Orders and a transcript of proceedings in the District Court on November 30, 1977.

Following discovery in the form of interrogatories and depositions, the City moved the District Court to dismiss the remaining claims for lack of jurisdiction and for judgment on the pleadings. The relevant issues were briefed by counsel and the District Court subsequently denied the City's motion by order of November 18, 1977. No opinion accompanied this order. Concurrently with this denial, the District Court advised counsel that it appeared that this case might be one in which abstention to determine an issue of state law is proper and requested memoranda in point.

On November 30, 1977, the District Court heard oral argument regarding the merits of abstention and, for the reasons stated from the bench, announced that it would abstain but retain jurisdiction pending determination of an issue of state law in the Virginia courts. An order to this effect followed on December 19, 1977, from which the Ancarrows took an interlocutory appeal of right to the U. S. Court of Appeals for the Fourth Circuit.

Subsequent to the filing of a notice of appeal by the Ancarrows, the City moved the District Court to amend its order of November 18, 1977, denying the City's motions, to include the language prescribed by 28 U.S.C. §1292(b). The District Court granted this motion and entered an order on February 13, 1978, to amend the order of November 18, 1977. Thereafter, the City petitioned the Court of Appeals to permit an interlocutory appeal of the District Court's order of November 18, 1977, as amended, and an appeal was granted the City on March 13, 1978.

These appeals were consolidated for briefing and argument and on June 5, 1979, the Court of Appeals announced a ruling in which it found that the Ancarrows' claims were not within either federal common law or admiralty jurisdiction and that no federal question is presented by this case. Consequently, the Court of Appeals found that abstention was unnecessary and that the District Court erred in denying the City's motion to dismiss the complaint for failure to state a federal claim on which relief may be granted. Thus, the Court of Appeals reversed the judgment of the District Court and remanded the case for dismissal of the complaint. Ancarrow v. City of Richmond, 600 F.2d 443 (4th Cir. 1979). The Court of Appeals denied rehearing on July 16, 1979.

Statement of Facts

During the years 1961 and 1962, Newton H. and Josephine Ancarrow purchased adjacent parcels of land, one of which is bounded by the James River. The land was then leased to Ancarrow Marine, Inc., a boat building firm owned by the Ancarrows. Buildings suitable for the construction of boats were erected on the tract and Ancarrow Marine commenced operations at that location. In 1965, Ancarrow Marina placed in service an elaborate concrete structure capable of launching and retrieving large pleasure craft in the James River. From its inception Ancarrow Marina, Inc. was insolvent and it ceased operations in 1969. Garrett v. Ancarrow Marine, Inc., 211 Va. 755, 180 S.E.2d 668 (1971). Prior and subsequent to the demise of Ancarrow

Marine, Inc., the public was permitted to launch boats at the Ancarrow tract. The buildings formerly used by Ancarrow Marine were leased by other firms from time to time, but eventually were extensively damaged by flooding and fell vacant.

In 1975, the City of Richmond instituted condemnation proceedings in the Circuit Court of the City of Richmond to acquire title to the Ancarrow tract in fee simple for the purpose of expansion and improvement of the adjacent Richmond sewage treatment plant. The record of that proceeding, on which the City relied in part for the purpose of its motions, demonstrate that during the trial of the condemnation proceeding, the Ancarrows' evidence included reference to pollution in the James River. The trial court refused to permit such reference except insofar as the condition of the river had bearing on just compensation for the land condemned by the City. At one point in that proceeding, counsel for the Ancarrows complained that the rulings of the trial court in this regard were denying just compensation. In response the trial court offered a mistrial, but this was declined. The Ancarrows were awarded $130,000 as compensation for their land and improvements and subsequently they filed exceptions to the award, claiming among other things, that the award was inadequate. The Ancarrows' exceptions were overruled and the City took fee simple title to the tract on April 5, 1976. No appeal was taken from this state court proceeding by the Ancarrows. The Complaint, however, makes reference to the condemnation of their land and

improvements by the City and states that the state court's award was "grossly inadequate" to compensate the Ancarrows "for the value their property would have had but for the activities of the Defendants in allowing the pollution problems of the James River to continue unabated." Complaint, para.22, page 5.

Discovery had during the pendency of the action revealed that the Ancarrows envisioned a marina on their land replete with hotel, restaurant and docks and slips which went unbuilt, it is alleged, because of the polluted condition of the river which, over the years that they owned the adjacent tract, did not improve, they claim, sufficiently to attract the boating public for their purpose.

ARGUMENT

I. THE DECISION BELOW IS NOT IN CONFLICT WITH APPLICABLE VIRGINIA LAW.

The Ancarrows' Complaint presents eight claims for relief.[2] The first four

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[2]These claims may be summarized as follows:

First Claim:	42 U.S.C. §1983.
Second Claim:	taking without just compensation, 5th and 14th Amendments.
Third Claim:	admiralty.
Fourth Claim:	federal common law.
Fifth Claim:	taking without just compensation, Va. Const., Art. I, §11.
Sixth Claim:	nuisance.
Seventh Claim:	negligence.
Eighth Claim:	trespass.

claims for relief presented by the Complaint are asserted as federal claims or claims to which the District Court's original jurisdiction attaches according to the terms of the relevant statutes of the United States. The balance of the Ancarrows' claims are "State claims" for which it is alleged that the District Court has pendent jurisdiction.

In support of these claims, the Complaint presents a common set of facts enumerated as paragraphs 9-22. However, not all of the allegations of paragraphs 9-22 of the Complaint can be read against the City.

As the Preliminary Statement recites, the District Court dismissed the Ancarrows' First or 42 U.S.C. §1983, Claim against all parties defendant. In a memorandum opinion to which the District Court made reference in Orders of September 9 and 15, 1977, dismissing the individual defendants, the District Court stated that:

> "Without objectively adequate grounds plaintiffs surmised that members of the Richmond City Council voted to take plaintiffs' real estate by eminent domain out of maliciousness and ill will toward the plaintiffs. Having instituted suit against the councilmen in their individual capacities, plaintiffs proceeded to conduct discovery and were unable to obtain a scintilla of evidence in support of their surmise." Memorandum Opn., page 2.

The Court's ruling was a judgment on the merits of the plaintiffs' claim. The averments of the Complaint common to all of the plaintiffs' claims and which formed the basis for the plaintiffs' 42 U.S.C. §1983 claim are contained in paragraphs 19 through 21 of the Complaint and restated in paragraphs 24 and 25 which relate specifically to the First, or §1983 Claim.

Thus, the allegations of paragraphs 19-21 with the exception of the fact of the condemnation alleged in paragraph 20, are conclusory and so baseless that they now can be considered only as frivolous matters alleged simply to invoke the District Court's jurisdiction. Cf. Preston v. Purtell, 410 F.2d 234 (4th Cir. 1969).

In essence, the averments common to all of the Ancarrows' claims exclusive of the matters contained in paragraphs 19-21 of the Complaint assert that during the years 1961 and 1962, the Ancarrows purchased a riparian tract upon which they intended to construct and build a boat building and repair facility as well as a marina. It is averred that prior and subsequent to the purchase of this tract the Ancarrows received numerous representations from unnamed officials of the City of Richmond "that the pollution problems of the James River would soon be abated." The Ancarrows allege that notwithstanding these representations the City has "not taken reasonable steps toward solving the pollution problems of the James River," but, nevertheless, based on these representations, the plaintiffs have expended large sums of money and

their own labor to construct facilities on their land toward their goal of operating boat building, repair facilities and a marina. The severe pollution problems of the James River prevented the Ancarrows, they allege, from operating these facilities economically and significantly reduced the value of their property. The plaintiffs attribute the condition of the James River primarily to the conduct of the City in the operation of its sewage system. The City has condemned the Ancarrows' land and the Ancarrows allege that the amount awarded was grossly inadequate to compensate them for the value their property would have had but for the fact that the City allowed the pollution problems of the James River to continue unabated.

For the purpose of passing on the merits of the City's motions, the Court of Appeals reviewed the Ancarrows' claims of a "taking" within the meaning of the Fourteenth Amendment, admiralty, and federal common law. The Ancarrows here seek review of the lower court's judgment regarding their "taking" and federal common law claims.

It should be noted and cannot be underemphasized that the case urged upon this Court for review is presented as a matter of "...discharges of raw sewage by the City [which] created a situation in which the James River in the immediate vicinity of...[the Ancarrows'] property was so fouled with fecal matter...and other debris that the use of the river, particularly for recreational purposes, was virtually eliminated." (Emphasis added.) Petition for Writ of Certiorari at 11. Thus, the phrase "immediate vicinity" as the Ancarrows

have emphasized it, takes on a broader meaning in the context of the quotation than might otherwise appear upon a casual reading.

In contrast, the Ancarrows continue in their Petition to state that "[i]n addition they alleged that these discharges...floated onto their land even above the ordinary high water mark, and caused a substantial interference with the use of their land." Ibid at 11, 12. The Ancarrows thus articulate two distinct effects of pollution which they attribute to the City, one bearing on the river, the other bearing on the land. However, the case law of Virginia on which the Ancarrows rely is employed by them for their purpose here only in the context of direct impact of pollution on their land between and above the low and high water marks. They therefore place emphasis on the long settled rule in Virginia stated in Darling v. City of Newport News, 123 Va. 14, 96 S.E. 307 (1918) as follows:

> "There is a marked and well defined distinction between the pollution of a small non-navigable stream, and the pollution of large tidal navigable bodies of salt water, for the reason that in the first case the bed of the stream and the waters are owned by the riparian owners while in the latter case the bed of the navigable, tidal salt water and the waters themselves are owned and

> controlled by the State, for the use and benefit of all the public, subject only to navigation. It is for the State to say what uses shall be made thereof and by whom, subject always to the right of the public, and for the State, through the legislative branch of the government, to say how much pollution it will permit to be emptied into and upon its water, so long as the owners of the land between low water and high water mark are not injured." (Emphasis added.) 123 Va. at 16-17, 96 S.E. at 307.

It should be noted that this concluding caveat is not couched in terms of owners of riparian rights, but, rather, in terms of owners of land. Thus, the caveat runs to the protection of the owner of land from which riparian rights have been severed.

Nowhere do the Ancarrows allege that pollution deposited on their land prevented them from realizing enhanced value if the land were put to use as a marina. On the contrary, the essence of their claim is that the City, by failing to cleanse the river to such degree as may be suitable for public use of a marina, a potential value of land was not realized. In this context, direct injury to the land above the low water mark is only of collateral interest, since if it were by some means abated it would not necessarily follow

that the river itself would be any more suitable for the Ancarrows' purposes.

Thus, the Court of Appeals found that:

> "The gravamen of plaintiffs' due process claim is that they have a riparian right to use public waters in a navigable stream, which was taken in the constitutional sense by the city's continuing pollution of the James River. Had the river been unpolluted at the time plaintiffs' property was condemned, the value of their marina improvements would have been enhanced and their condemnation recovery correspondingly greater.
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> * * *
>
> "...[P]laintiffs claim that they have a state-recognized riparian right to demand water of a particular purity, both for their own use and for the use of customers at their marina. They also claim a right which may best be termed a right of beneficial location to have the city put the public water of the James River to a use which is more favorable to their commercial marina development than the present use for sewage disposal." 600 F.2d at 446.

The nature and extent of the rights of riparian owners are to be determined by

the law of that state wherein the waters in which rights are claimed lie. Fox River Paper Co. v. Railroad Commission of Wisconsin, 274 U.S. 651, 71 L.Ed. 1279 (1927); Kaukauna Water Power Co. v. Green Bay and Miss. Canal Co., 142 U.S. 254, 35 L.Ed. 1004 (1891). Consequently, after hearing argument on November 30, 1977, the District Court abstained to permit determination of the scope of the Ancarrows' riparian rights in the context of their claim in the courts of Virginia. See Transcript of proceedings in the District Court of November 30, 1977. The Court of Appeals on the other hand found that abstention was unnecessary in view of its prior, exhaustive examination of Virginia case law in point in DuPont Rayon Co. v. Richmond Industries, 85 F.2d 981 (4th Cir. 1936).

Thus, in DuPont, where the plaintiff sought to enjoin the disposal of dyestuffs in the James River on the ground that as a riparian owner it used river water in its industrial process and the presence of dyestuff therein would have the effect of greatly depreciating the value of its product, the Court of Appeals found that:

> "...[W]hile the riparian owner is entitled under the law of Virginia to make a reasonable use of the water as it flows past or laves his land..., this right on tidal, navigable waters is subject to the jus publicum, or right of the public, to use the waters for sewerage purposes." (Citation of Virginia authorities omitted) 85 F.2d at 982.

In reliance on its prior decision, the Court of Appeals said of the Ancarrows' claim that the same "...reasoning applies with equal force to plaintiffs, who claim a superior right to use water of a particular purity for their marina development." 600 F.2d at 446.

Moreover, the Court of Appeals examined the State Water Control Law[3] adopted by Virginia subsequent to DuPont and found it to be "...merely one portion of a statutory scheme to regulate the quality of the Commonwealth's waters." See Darling v. City of Newport News, ibid. Thus, "[t]he statute does not by its terms purport to grant a new riparian right to private property owners which is superior to a city's state-regulated right to lawfully pollute public waters." 600 F.2d at 447. Moreover, as the Court of Appeals noted in DuPont, disposal of sewerage in tidal water is an incident of the jus publicum, which is itself an incident of the sovereignty of Virginia which may not be relinquished or destroyed except to the extent that the State or Federal Constitution may plainly authorize the legislature of Virginia to do so. Commonwealth v. City of Newport News, 158 Va. 521, 547, 164 S.E. 689, 697 (1932).

As was said in DuPont and is equally true in this case, "...it must be borne in mind here that the question involved relates merely to the right of the riparian owner to use the water and prevent

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[3]Va. Code §62.1-44.2, et seq. [1973 Repl. Vol.]

pollution thereof, not to fouling of the land thereof." 85 F.2d at 983. Here, as heretofore noted, the Ancarrows predicate their claim on value their land would have had but for the pollution of the river and not fouling of the land itself. In truth, the Ancarrows may be said to claim a proprietary interest in the jus publicum itself. Consequently, it is extravagant for the Ancarrows to claim, as they do at page 15 of their Petition, that this case presents an "...opportunity ...to clarify the law relating to the degree to which states may immunize governmental activities from the requirements of the Eminent Domain Clause by declaring that the interest interfered with is not a 'property' right."

II. THERE IS NO CONFLICT BETWEEN THE DECISION OF THE COURT OF APPEALS AND THE DECISIONS OF THIS COURT.

The Ancarrows have also relied on the Virginia authorities cited at page 11 of their Petition for the proposition that the "superior right" of municipalities to discharge sewage does not extend to creating a nuisance. Thus they claim at page 18 of their Petition that "[t]he manner in which the City's sewage discharge affected the Ancarrows makes their injury different not only in degree but also in kind from that suffered by the general public." (Emphasis added.) However, the Court of Appeals found that "...plaintiffs have suffered a consequential injury which, though greater in degree than that of the rest of the public, is the same in kind," citing

Reichelderfer v. Quinn, 287 U.S. 315, 77 L.Ed. 331 (1932), 600 F.2d at 447. It is manifest that the Ancarrows have suffered no injury different in kind from the general public simply because they sought to put their land to use as a marina and the Court of Appeals was clearly correct.

It is noteworthy that the Ancarrows make no claim that the James River was clean enough for their purposes and the City subsequently fouled it. Rather, the Complaint is fairly read to mean that the Ancarrows were aware of the river's condition prior to purchasing their land and now claim detrimental reliance on "numerous representations from officials of the City of Richmond." Complaint, paras. 12-15, page 4: Ancarrow v. City, ibid. ftn. 1 and 2, 600 F.2d at 445, 446. Thus, at best, the Ancarrows raise issues of state law as the Court of Appeals found. And, consequently, when the Complaint is viewed in this context, the allegation of a "taking" within the meaning of the relevant constitutional provisions can only be viewed as one of mere form. As this Court has observed, a federal question must exist "not in mere form, but in substance, and not in mere assertion but in essence and effect." Cuyohoga River Power Co. v. Northern Ohio Traction & Light Co., 252 U.S. 389, 397, 64 L.Ed. 626, 630 (1920). Thus, the Ancarrows' reliance on those authorities set forth in part 2 of their Petition is misplaced and, as the Court of Appeals found, there is no basis for jurisdiction grounded on an issue of federal common law.

CONCLUSION

As the Court of Appeals found, this case presents issues of state law at best. There is no issue here worthy of this Court's consideration. Consequently, writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that 3 true copies of the foregoing Brief in Opposition To A Writ of Certiorari were mailed, first class postage prepaid, this 16th day of November, 1979, to Patrick M. McSweeney, Esq., McSweeney & Stutts, 121 Shockoe Slip, Richmond, Virginia 23219, counsel for Petitioners.

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